Supreme Court, U.S.
FILED
MAR 11 1992
OFFICE OF THE CLERK

No. 91-471

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

GERALD H. YAMADA
Principal Deputy General Counsel

LISA K. FRIEDMAN
Associate General Counsel for Solid Waste and Emergency Response

PETER R. STEENLAND, JR.
ANNE S. ALMY
NANCY K. STONER
LOUISE F. MILKMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

ANGELIA SOUDER BLACKWELL
Attorney
Environmental Protection Agency
Washington, D.C. 20460

QUESTION PRESENTED

Whether a disposal tax that applies only to wastes generated outside the State violates the Commerce Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-471

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Petitioner, the operator of a large-scale commercial waste disposal facility in Emelle, Alabama, challenges Alabama legislation imposing burdens on the management of hazardous waste generated outside of Alabama. The United States Environmental Protection Agency has a vital interest in maintenance of the national market in hazardous waste treatment, storage and disposal. In addition, the Emelle facility is one of only two facilities east of the Mississippi River authorized under federal law to dispose of polychlorinated biphenyls (PCBs); it is also licensed to dispose of a wide range of other hazardous wastes. It accordingly receives substantial shipments from hazardous waste sites subject to cleanup under the

Superfund program, and is extensively used by agencies of the United States for storage of the hazardous wastes they generate.

At this Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

STATEMENT

1. Hazardous wastes are defined by federal law as solid wastes which may "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed." § 1004 (5)(B) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6903(5)(B) (RCRA).[1] Subtitle C of RCRA, 42 U.S.C. 6921-6939b, directs the Environmental Protection Agency (EPA) to establish a comprehensive "cradle to grave" system regulating the generation, transport, storage, treatment

[1] Solid wastes are defined in 42 U.S.C. 6905(27) as:

> discarded material including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities * * *.

The statutory definition specifically excludes domestic sewage and point source discharges regulated under the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, as well as certain material regulated under the Atomic Energy Act, 42 U.S.C. 2011 *et seq.* Therefore, hazardous wastes do not typically include nuclear (radioactive) wastes, although certain "mixed" radioactive and hazardous wastes are regulated under RCRA as well as the applicable nuclear waste statute. See generally Gov't Br. in *State of New York* v. *United States*, *County of Allegheny* v. *United States*, and *County of Cortland* v. *United States*, Nos. 91-543, 91-558, and 91-563. The Emelle facility is not authorized to accept mixed wastes. Chemical Waste Management, Inc., RCRA Permit No. ALD 000 622 464 (May 27, 1987).

and disposal of hazardous wastes.[2] To implement this regime, RCRA directs EPA to "promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste." 42 U.S.C. 6921. EPA's regulations identify hazardous wastes in two ways. First, "characteristic" hazardous wastes, subject to regulation under Subtitle C of RCRA, include wastes that exhibit any of four specific properties (ignitability, corrosivity, reactivity, and toxicity). See 40 C.F.R. Pt. 261, subpt. C. Second, "listed" hazardous wastes are identified in published lists of specific hazardous wastes (40 C.F.R. Pt. 261, subpt. D). Most of these wastes are listed because they contain significant levels of hazardous constituents[3] which, if released into the environment, could present a substantial threat to human health and the environment. There are more than 500 listed wastes.[4]

[2] Under RCRA, States may be authorized to implement a state program in place of the federal program, if, *inter alia*, the state program is "equivalent to" and "consistent with" the federal program. 42 U.S.C. 6926(b). In general, once a State is so authorized, the State, and sometimes also the federal, requirements apply, and the State becomes the permitting authority. In addition, "[n]othing in [RCRA] shall be construed to prohibit any State * * * from imposing any requirements * * * which are more stringent than those imposed by [federal] regulations." 42 U.S.C. 6929. Currently, 47 States and territories—including Alabama—have authorized RCRA programs. DRPA, Inc., *Authorization Tracking Data System Report* (Feb. 12, 1992).

[3] "Hazardous constituent" is a term of art referring to those constituents compiled in Appendix VIII of 40 C.F.R. Pt. 261 that serve as the basis for listing a waste as a toxic hazardous waste. 40 C.F.R. 268.2(b). See 40 C.F.R. 261.11 (a)(3).

[4] Certain wastes, such as household wastes, and certain petroleum, agricultural and mining wastes, are excluded from regulation under subpart C. 40 C.F.R. 261.4.

Thus, the term "hazardous waste" covers a wide variety of wastes that pose different types of threats to human health and the environment. For example, various forms of heavy metals such as cadmium and lead may leach into soils and the groundwater if exposed to the elements. Some organic chemicals may be extremely hazardous to human health at low levels of exposure. See generally 55 Fed. Reg. 11,738 (1990). Paint wastes may be ignitable at relatively low temperatures, and therefore are dangerous if not properly managed. See 55 Fed. Reg. 22,543 (1990).

Approximately 240 million tons of hazardous waste are generated in this country annually by some 80,000 generators. *Hearing Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 4 (1991) (testimony of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response). Most of these wastes are generated by the chemical industry; the rest come from a wide variety of industrial processes, including petroleum refining, metal finishing, general manufacturing, electronics, printing, health services, and transportation. See EPA, *1987 Biennial Report Data Analysis* (1992). Particular types of wastes are generated in volumes ranging from a few tons annually (*e.g.*, certain laboratory wastes) to several million tons annually (*e.g.*, corrosive or acid wastes generated by the chemical industry). Generators of hazardous waste are subject to provisions of RCRA governing, *inter alia*, labeling, manifesting, and packaging. 42 U.S.C. 6922.

Pursuant to RCRA, facilities that treat, store or dispose of listed or characteristic hazardous wastes must obtain a permit or interim status, and must comply with applicable regulations. 42 U.S.C. 6924,

6925. Nationwide, there are approximately 4,700 facilities operating under federal permits authorizing the treatment, storage and disposal of some form of hazardous waste; these facilities contain approximately 81,000 distinct waste management units. EPA, *The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study* 7 (1990). EPA has promulgated detailed regulations prescribing minimum operating standards for the management of hazardous waste at these facilities. 40 C.F.R. Pts. 264, 265. For each type of facility, the regulations govern such matters as inspection, testing, methods of treating incompatible wastes, groundwater monitoring, insurance requirements, recordkeeping and reporting requirements and performance standards.[5] *Ibid.*

In addition, the regulations prescribe specific requirements for the facility's design and operation, specify closure and post-closure procedures, and impose financial responsibility requirements, as well as general facility standards such as security, contingency planning, and siting location standards.[6] In

---

[5] Special requirements apply to particular wastes, and certain forms of treatment, storage or disposal are prohibited for certain wastes. For example, the placement of bulk or non-containerized liquids or waste-containing free liquids in landfills is prohibited. 40 C.F.R. 264.314. Some wastes may not be incinerated, 40 C.F.R. 264.344; others may be placed in surface impoundments only in accordance with an EPA-approved plan. 40 C.F.R. 264.231.

[6] For example, the regulations prohibit or restrict the siting of facilities near areas of seismic activity, in 100 year floodplains, or in salt dome formations, salt bed formations, or underground mines or caves. 40 C.F.R. 264.18, 265.18. See generally EPA, *Permit Writers' Guidance Manual for Haz-*

conjunction with the Department of Transportation, EPA also regulates the transportation of hazardous wastes. See 42 U.S.C. 6923.[7]

In 1984, Congress amended RCRA to minimize reliance on land disposal. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (HSWA). As amended, Subtitle C of RCRA phases out most land disposal of untreated hazardous wastes.[8] Ultimately, all waste placed in land disposal units must either be treated to meet standards established by EPA under RCRA § 3004 (m) (42 U.S.C. 6924(m), amended by § 202(a), 98 Stat. 3232-3233), or be disposed of in a land disposal unit from which EPA has determined that there will be no migration of hazardous constituents for as long as the waste remains hazardous. See 42 U.S.C. 6924(d), (e), and (g).[9]

---

ardous Waste Land Storage and Disposal Facilities, OSWER Directive No. 9472-00-1 (Feb. 1985).

[7] Approximately 20,000 transporters are regulated under RCRA. EPA, *RCRIS National Oversight Database* (1992).

[8] Land disposal includes, but is not limited to: "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." 42 U.S.C. 6924(k).

[9] Section 3004(m)(2) of RCRA, 42 U.S.C. 6924(m)(2), authorizes the land disposal of wastes otherwise subject to a prohibition, provided that the wastes are "treated to a level or by a method specified" by EPA pursuant to Section 3004 (m)(1), 42 U.S.C. 6924(m)(1). That Section instructs EPA to establish levels or methods for the treatment of a hazardous waste which diminish the toxicity of the waste, or reduce the likelihood of migration, so that the threat to human

The pretreatment standards for the land disposal of most hazardous wastes have been promulgated.[10] Unless a "capacity variance" is approved by EPA to delay the effective date of the treatment standards because adequate treatment capacity does not exist, wastes must be pretreated prior to land disposal. If EPA has approved a capacity variance for a particular waste, that waste may be land disposed without meeting the prescribed treatment standard, but only at sites where minimum prescribed technological requirements are met. 42 U.S.C. 6924(h)(4) and (o). Petitioner's Emelle facility is one of a limited number of land disposal sites that meets these statutory requirements.

---

health and the environment is minimized. To satisfy this directive, EPA has required treatment to specified levels (*e.g.*, numerical constituent requirements) or by identified methods in order to minimize threats. For example, certain organic wastes, including some pesticides, must be incinerated. 55 Fed. Reg. 22,612 (1990). Other wastes require a series of treatments: for example, the prescribed treatment method for one group of wastes includes treatment by electrolytic oxidation, followed by algaline chlorination, followed by precipitation, settling and filtration. 54 Fed. Reg. 26,600 (1989).

[10] The first phase of the "land ban," covering certain listed solvent and dioxin-containing wastes, became effective November 8, 1986. 42 U.S.C. 6924(e)(1). The land ban for another group of wastes known as "California list wastes," including PCBs, halogenated organic compounds, and certain liquid wastes, took effect July 8, 1987. 42 U.S.C. 6924(d). The standards for most other hazardous wastes were promulgated between 1988 and 1990. EPA is now in the process of setting the standards for "newly identified" wastes, *i.e.* those listed or identified as hazardous since RCRA was amended by HSWA.

2. Most of the hazardous waste in this country is disposed of in surface impoundments on the site where it is generated. Nevertheless, each year almost 4 million tons of it is transported across state lines for recycling, treatment and disposal using a wide variety of treatment and disposal technologies. Every State exports some types of hazardous waste, and all but twelve States import some form of hazardous waste. *1987 National Biennial RCRA Hazardous Waste Report* 2-36. Fourteen States export more than half of their hazardous wastes; in nine States, out-of-state wastes constitute more than 50% of the waste managed. *Id.* at 2-41. On average, States export wastes to 19 other States, to take advantage of 12 different types of management technology. National Solid Wastes Management Ass'n, *Interchange of Hazardous Waste Management Services Among States* 8, 12 (Dec. 31, 1990).

Given the nature of the hazardous waste management industry, such interstate transactions are inevitable. A wide range of factors—economic and environmental—dictates the choice of hazardous waste management facilities. Some wastes are generated in such small amounts that it is impractical to require a facility to treat or dispose of them in every State in which they are generated, or even in most States. In many cases, treatment or disposal facilities are so capital intensive that their economic viability depends upon the fact that there are only a few of them in the country.[11]

[11] For example, there are currently a small number of large regional hazardous waste disposal facilities: 35 commercial land disposal facilities in 17 States, and 15 commercial incinerators in 9 States. Memorandum from Suzanne Rudzinski, Environmental Protection Agency, to Regional Hazardous Waste Branch Chiefs (May 6, 1991). Attempts to establish smaller facilities have not proved commercially feasible. One commentator notes that Iowa recently considered establishing a long-term storage facility in the State to serve in-state needs. Based on the relatively small amount of waste the facility would handle, the per ton storage cost would have been several times greater than the cost of existing out-of-state disposal. Alex Brown & Sons, Environmental Services Group, *Hazardous Waste: Land Disposal Update* 7 (Oct. 13, 1989).

The new land disposal pretreatment regulations promulgated under HSWA have intensified the specialization of the hazardous waste market and highlighted the advantages of economies of scale. In general, the regulations encourage the incineration and recycling of hazardous waste. Because they require more technically complex and costly treatment prior to land disposal, many smaller generators cannot afford to treat their wastes on site, or do not possess the technical expertise to do so. In addition, the new regulations encourage existing disposal facilities such as deepwells and landfills to add treatment processes, thus tending further to integrate the hazardous waste management industry.[12]

In sum, the business of treating, storing and disposing of hazardous wastes is extraordinarily complex. For a significant portion of those wastes—depending on the type of waste involved and/or the size and sophistication of the generating company—

[12] Similar increases in off-site treatment and the use of commercial treatment facilities can be expected from other recently promulgated EPA regulations—those specifying stringent air emissions standards for boilers and industrial furnaces (56 Fed. Reg. 7134 (1991)), and Clean Water Act pretreatment and discharge standards (33 U.S.C. 1317(b) and (c); 40 C.F.R. Pt. 403).

commercial treatment, storage or disposal in another State in the only realistic alternative.

3. Congress has recognized the necessity for long range planning to assure the continued availability of adequate facilities to treat and dispose of hazardous wastes. In 1986, the Superfund Amendments and Reauthorization Act (SARA) required each State (as a condition of receiving federal cleanup funds) to demonstrate that it has access to "adequate capacity" for the "destruction, treatment or secure disposition" of the hazardous wastes "reasonably expected" to be generated in the State during the following twenty-year period. 42 U.S.C. 9604(c)(9)(A). The capacity can be "outside the State in accordance with an interstate agreement or regional agreement or authority." 42 U.S.C. 9604(c)(9)(B).[13] The assurance of capacity has to be acceptable to the United States, and the capacity must comply with RCRA. 42 U.S.C. 9604(c)(9)(C) and (D).

EPA has interpreted the SARA capacity assurance provision in a series of guidance documents,[14] which indicate that an exporting State's reliance on out-of-state capacity to satisfy its capacity assurance requirement must be in accordance with an interstate

[13] See 132 Cong. Rec. 28,436 (1986) (remarks of Sen. Chafee) ("A site in every State is not required. In some cases, multi-State efforts may be appropirate. Use of binding agreements through interstate compacts guaranteeing access to a facility is only one example of how a State may provide the requisite assurances."). Accord 132 Cong. Rec. 29,741 (1986) (statement of Rep. Florio).

[14] Assurance of Hazardous Waste Capacity: Guidance to State Officials, OSWER Directive No. 9471.00-01 (formerly No. 9010.00 (Dec. 1988)); supplemented by OSWER Directive No. 9471.00-02 (formerly 9010.00a (Oct. 1989)) and OSWER Directive No. 9471.00-01a (Apr. 15, 1991).

agreement, regional agreement, or similar authority. However, a State may not ban the import of wastes to the facilities upon which it is relying to provide its own assurance of capacity. So interpreted, the capacity assurance program aims to create an adequate nationwide capacity to provide for the disposal of hazardous wastes expected to be generated during the next twenty years. With adequate capacity in place, generators of hazardous wastes can choose between the alternative facilities available for the treatment and disposal of wastes. But the capacity assurance program does not dictate where the wastes expected to be generated in each State will actually be treated and/or deposited.

4. This action was instituted in Alabama circuit court by petitioner, the owner and operator of the Emelle Facility, a commercial hazardous waste treatment and disposal landfill in western Alabama operating under both federal and state permits. RCRA, 42 U.S.C. 6924(a); Ala. Code § 22-30-12 (1990). The suit challenges, on federal and state constitutional grounds, Alabama Act No. 90-326, 1989 Ala. Acts 90-326, § 3, which imposes "an additional fee * * * levied at the rate of $72.00 per ton" for "waste and substances which are generated outside of Alabama and disposed of at a commercial site * * * in Alabama" (Pet. App. 106a). The circuit court found the Additional Fee unconstitutional as a violation of the Commerce Clause because it facially discriminates against interstate commerce in hazardous wastes (Pet. App. 85a).[15]

[15] The court upheld the constitutionality of two other provisions of Act No. 90-326 that petitioners argued had the practical effect of requiring only the Emelle facility to bear significant economic burdens. The Alabama Supreme Court

The Alabama Supreme Court reversed that ruling; it distinguished the Additional Fee from the similar state legislation struck down in *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), on the ground that the Fee serves legitimate health and safety, environmental conservation, and compensatory revenue purposes that could not adequately be served by nondiscriminatory alternatives (Pet. App. 44a).[16]

This Court granted certiorari limited to the question of whether Alabama's Additional Fee provision violates the Commerce Clause.

SUMMARY OF ARGUMENT

This case is controlled by the convergence of established principles respecting state taxation of interstate commerce with this Court's decision in *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). The Court there held that interstate waste transactions are fully subject to the Commerce Clause prohibition of discriminatory state statutes. Although respondents attempt to defend the facially discriminatory Additional Fee by asserting legitimate state environmental and health and safety concerns, those concerns can be at least as effectively addressed by nondiscriminatory restrictions on the transportation and disposal of *all* hazardous waste within the State, and accordingly are insufficient to justify the treatment of out-of-state generated hazardous waste less favorably than identical in-state generated waste. Nor

affirmed these holdings, and this Court limited the grant of the petition for certiorari to consideration of the provision discussed in text.

[16] Justice Houston concurred on the theory that hazardous waste is not an article of commerce protected under the Commerce Clause. Pet. App. 48a.

can the Additional Fee be upheld on the theory that it is a quarantine law that prevents traffic in noxious substances, because it is a tax, not a ban, and it is not evenhanded. Finally, because Alabama has not demonstrated that the out-of-state waste subject to the Additional Fee is significantly different from hazardous waste generated in Alabama, *Maine* v. *Taylor*, 477 U.S. 131 (1986), does not justify that tax.

ARGUMENT

I. THE INTERSTATE MARKET IN HAZARDOUS WASTE MANAGEMENT SERVICES IS PROTECTED BY THE COMMERCE CLAUSE

The generation of waste, including hazardous waste, is a necessary component of any economy based on manufacturing. If our nation's manufacturers are unable to dispose of their wastes in an environmentally sound and cost effective manner, they will be unable to continue to operate.[17] See *Illinois* v. *General Electric Co.*, 683 F.2d 206, 213 (7th Cir. 1982) ("The efficient disposal of wastes is as much a part of economic activity as the production that yields the wastes as a byproduct, and to impede the interstate movement of those wastes is as inconsistent with the efficient allocation of resources as to impede the interstate movement of the product

[17] Risk management is an important component of cost effective disposal of hazardous waste. To enable industry to manage risks, especially the risk of potential Superfund liability, industry must be able to obtain access to safe facilities —including centralized treatment and storage facilities that may be located in States other than those in which the waste is generated—and to limit the number of facilities to which waste is sent. Restrictions on cross-border movements of waste could effectively preclude these waste management strategies for many companies.

that yields them."), cert. denied, 461 U.S. 913 (1983).

This Court recognized this principle in *Philadelphia* v. *New Jersey*, 437 U.S. 617, 622 (1978), which held that interstate waste transactions are fully subject to the Commerce Clause prohibition against discriminatory or unduly burdensome state statutes.[18] That decision relies upon the purposes animating dormant commerce clause analysis to hold that New Jersey could not "isolate itself in the stream of interstate commerce from a problem shared by all." 437 U.S. at 629. See *Wyoming* v. *Oklahoma*, 112 S.Ct. 789, 800-801 (1992) (relying on and quoting *Philadelphia* v. *New Jersey*). Cf. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

That principle is at least as important to industries serving the nationwide market for hazardous waste management as it is to other industries. A national market in waste management services is necessary for the safe and efficient management of hazardous wastes. See pp. 8-10, *supra*. Arbitrarily dividing waste management along state lines would inhibit the selection of the most environmentally sound and least costly treatment and disposal option for each particular type of such waste. And Balkanizing

[18] The New Jersey statute and implementing regulations, while providing a limited exception for certain shipments of hazardous wastes, banned the import of hazardous waste destined for "disposal on or in the lands of [New Jersey]." 437 U.S. at 619 n.2 (quoting regulations).

waste treatment and disposal would force the replication of facilities already existing in other States,[19] at best resulting in unnecessary duplicative investments in waste facilities and at worst threatening the economic viability of both the existing and the new facilities.[20] See pp. 8-10, *supra*.

There is nothing unique about hazardous waste that places it outside the stream of commerce to which the dormant commerce clause applies. In *Philadelphia* v. *New Jersey*, this Court held that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." 437 U.S. at 622. Thus, *Philadelphia* v. *New Jersey* rejected the notion that the Commerce Clause distinguishes between desirable objects of trade and undesirable ones, or, as one court of appeals has

[19] In that situation, States or other governmental units might be forced to subsidize the construction and operation of local disposal facilities. Moreover, the prospect of such Balkanization could be expected not only to deter the commercial construction of facilities—which could no longer rely upon a multistate market—but also to deter investment in developing new, environmentally protective waste disposal technologies.

[20] The effect is similar to that of a state restriction permitting local hospitals to serve only state residents. Preventing out-of-state patients from utilizing a local hospital's expertise or specialized equipment would not only penalize those patients, but might also make it economically infeasible for the local hospital to offer some of those specialized services. If there are only a limited number of people nationwide who need a particular type of treatment, a hospital that cannot serve the entire market may not be able to purchase the specialized equipment necessary to perform that treatment. For similar reasons, fewer resources would be invested in research to develop new treatments.

termed it, between "goods" and "bads." *Illinois* v. *General Electric Co.*, 683 F.2d at 213.[21]

II. THE ADDITIONAL FEE VIOLATES THE COMMERCE CLAUSE

A. Alabama's Additional Fee Provision Discriminates Against Interstate Commerce in Hazardous Waste Management Services.

The federal union is built upon a presumption of free trade within a national market. *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 402 (1984). The powers given Congress to regulate interstate trade by the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, reflect this bedrock principle. And "[i]t has long been accepted that the Commerce Clause * * * also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988). Such a prohibition on state laws that dis-

[21] The rejection of such a distinction recognizes that most articles of commerce have both good and bad effects upon the State that imports them. For example, imports of automobiles may increase pollution, highway congestion, and the risks of accidents in the importing State. Cf. *Minnesota* v. *Clover Leaf Creamery*, 449 U.S. 456, 470 (1981) (plastic, nonreturnable nonrefillable containers consume energy resources and require solid waste disposal). Although the import of waste for disposal may present health and safety concerns, it also provides a source of employment for the State. Moreover, hazardous waste is now a raw material for some industrial processes. Thus, there is no bright line difference between hazardous waste and many other commodities in the interstate market. In any event, under *Philadelphia* v. *New Jersey*, *supra*, a particular court's determination of what is beneficial to the importing State and what is not provides no sound basis for the definition of an article of commerce entitled to constitutional protection.

criminate against interstate commerce is necessary to prevent a "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 356 (1951).

The Commerce Clause limitation restricts state taxing powers; "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984); accord *Westinghouse Electric Corp.*, 466 U.S. at 403.[22] Alabama's

[22] The incompatibility of discriminatory taxes and the Commerce Clause was recognized by this Court more than one hundred years ago in *Guy* v. *Baltimore*, 100 U.S. 434 (1879), which invalidated a Baltimore ordinance that charged a greater wharfage fee to vessels transporting out-of-state produced goods and articles than to vessels carrying Maryland goods. The rule of decision in that case was as follows:

> [N]o State can, consistently with the Federal Constitution, impose upon the products of other States * * * or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

100 U.S. at 439. Other than a compensating tax (see note 24, *infra*), this Court has never upheld a state tax that imposes a higher rate for interstate commerce than intrastate commerce. See, *e.g.*, *New Energy Co.* v. *Limbach*, 486 U.S. 269, 280 (1988) (tax credit for ethanol produced within State or in State providing reciprocal tax credit); *Bacchus Imports Ltd.* v. *Dias*, 468 U.S. 263 (1984) (tax exemption for liquor produced from plants native to State); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981) (taxing system including credits for most in-state natural gas uses); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977) (greater tax burden on interstate securities transactions than on similar intrastate transactions); *Hale* v. *Bimco Trading, Inc.*, 306 U.S. 375 (1939) (inspection fee for foreign cement).

Additional Fee provision violates this nondiscrimination principle on its face: an in-state generator can dispose of its hazardous waste in an Alabama landfill for $25.60 per ton, while an out-of-state generator must pay an additional $72 per ton to dispose of hazardous waste that is identical to the in-state waste in all respects except its State of origin. Pet. App. 86a, 106a. Such discrimination goes to the very heart of what the Commerce Clause prohibits.[23]

B. Alabama Has Nondiscriminatory Alternatives Available to Effect its Legitimate State Purposes.

Typically, once a state tax challenged under the Commerce Clause has been found to be discriminatory, it has been struck down without further inquiry. *Westinghouse Electric Corp.*, 466 U.S. at 406-407; *Maryland* v. *Louisiana*, 451 U.S. 725, 760 (1981); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 337 (1977). As this Court explained in *Freeman* v. *Hewitt*, 329 U.S. 249, 253 (1946), discriminatory taxes are unlike police power regulation of local aspects of interstate commerce:

> Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce.

Where a tax purports to protect the health and safety of the State's citizens rather than simply to

[23] Alabama's denomination of these charges as fees, rather than taxes, is irrelevant for constitutional purposes. See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987) (analyzing market fee as tax).

provide an additional source of revenue, it may nevertheless be appropriate to analyze that rationale to determine whether nondiscriminatory alternatives would serve as well to further it. This Court has cautioned, however, that any proffered justification for a facially discriminatory statute would be subject to "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979); cf. *New Energy Co.*, 486 U.S. at 278-280 & n.3 (tax on certain out-of-state produced ethanol invalid despite asserted health related aim).

The State of Alabama has legitimate concerns about the disposal of hazardous wastes at the Emelle facility. The Alabama Supreme Court identified several of these concerns: protecting the health and safety of Alabama's citizens, compensating Alabama's citizens for the costs and burdens of hazardous waste disposal, conserving the State's natural resources, and reducing the overall flow of waste traveling on the State's highways. Pet. App. 44a. However, since Alabama's hazardous waste is identical to that of out-of-state generators (Pet. App. 86a), Alabama's legitimate concerns relate to the *volume* of hazardous waste disposed of within the State, not to its source. These concerns, therefore, provide no justification for treating disposal of out-of-state generated hazardous waste less favorably than in-state generated hazardous waste.[24]

[24] If in-state disposers were actually paying more than out-of-state disposers for waste disposal, Alabama could properly impose a compensating tax on interstate commerce in hazardous waste that would "equalize[] previously unequal tax burdens by offsetting 'a specific tax imposed only on intrastate commerce for a substantially equivalent event.'" *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. at 287; see *Mary-*

Moreover, Alabama has several less discriminatory alternatives available to serve its legitimate state interests. The health and safety of Alabama's citizens could be served as well by imposing a cap or a per ton tax on *all* hazardous waste disposal within the State. And if Alabama objects to the *landfilling* of hazardous waste, it can stem the flow of hazardous waste into landfills either by capping the total amount of landfilled waste or by taxing the disposal of hazardous waste in landfills. See *Philadelphia* v. *New Jersey*, 437 U.S. at 626 (State "may pursue [its economic and environmental] ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected"); cf. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 619 (1981) (State can charge a per ton severance tax on coal even if it is borne primarily by out-of-state consumers).[25]

---

land v. *Louisiana*, 451 U.S. at 758-759. Alabama does not, however, assert that there is a specific tax on intrastate commerce for which the statute at issue in this case would serve as a compensating tax.

[25] If Alabama believes that federal regulation of hazardous waste management facilities is insufficient to protect the public health and safety of Alabama's residents, it is free to adopt more stringent regulations. 42 U.S.C. 6929 ("Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal] regulations."); cf. *Hazardous Waste Treatment Council* v. *Reilly*, 938 F.2d 1390, 1397 (D.C. Cir. 1991) (upholding EPA's determination that North Carolina's statute requiring thousand-fold dilution of discharges from commercial hazardous waste treatment facilities into surface waters above public drinking water intakes is consistent with federal law). It may not be consistent with RCRA, however, for a State to ban all disposal of hazardous

A nondiscriminatory tax could also be used to compensate the State for the expense of regulating, monitoring and dealing with the adverse effects of hazardous waste disposal. See *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972) (user fee for use of airport constitutional where interstate and intrastate flights subject to the same charges); *Capital Greyhound Lines* v. *Brice*, 339 U.S. 542, 548 (1950) (highway tax).[26]

The Alabama Supreme Court also found that the Additional Fee would conserve the environment and the State's natural resources. Alabama's interest in conserving its landfill capacity for its own in-state generators does not justify discrimination against interstate commerce.[27] This Court has long held that a State cannot discriminate against out-of-state commerce as a means of reserving its natural resources for its own citizens. As the Court explained in *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911):

> If the States have such [a] power * * * Pennsylvania might keep its coal, the Northwest its

---

waste within its borders. See *Ensco, Inc.* v. *Dumas*, 807 F.2d 743, 745 (8th Cir. 1986).

[26] The Alabama Supreme Court suggested that a flat tax on all hazardous waste disposal was not a viable alternative in this case because "Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country." Pet. App. 46a. But if a disproportionate portion of the hazardous waste disposed of in Alabama is generated out-of-state, then that same portion of a nondiscriminatory tax on waste disposal would be borne by generators in other States.

[27] As discussed pp. 10-11, *supra*, the capacity assurance provisions of SARA are intended to assure adequate disposal sites nationwide for Alabama-generated hazardous waste.

> timber, the mining States their minerals * * *. [The] influence on interstate commerce need not be pointed out * * *. If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

Accord, *e.g.*, *Hughes* v. *Oklahoma*, 441 U.S. 322, 338 (1979) (ban on export of state minnows); *Philadelphia* v. *New Jersey*, 437 U.S. at 624, 626-627 (ban on out-of-state waste); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 339 (1982) (ban on out-of-state sale of hydroelectric energy).

Finally, the Alabama Supreme Court justified the Additional Fee as an attempt to reduce the flow of waste traveling on the State's highways. Alabama could reduce the risks of accidents on its roads by vehicles carrying hazardous waste by imposing a nondiscriminatory per-mile tax on the use of those vehicles. Cf. *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 286 (1987) (tax that charges out-of-state trucks five times as much as in-state trucks per mile is plainly discriminatory). Alabama may also seek authorization from the Secretary of Transportation to enact stronger nondiscriminatory safety regulations for the transportation of hazardous waste. 49 U.S.C. App. 1811(b).[28]

---

[28] Respondents assert (Hunt Br. in Opp. 12-13) that the discriminatory fee is warranted by the risk that, if the State is ultimately required to bear the costs of cleaning up the Emelle Facility, it will be unable to obtain any meaningful contribution from the out-of-state generators. But federal law provides the State with ample authority to impose the financial costs of cleaning up the Emelle Facility on the generators of the waste—both in-state and out-of-state. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, generally subjects petitioner, as owner and operator of the facility, and the generators of the waste to strict, joint and several liability for "all costs of removal and remedial action incurred by * * * a State." 42 U.S.C. 9607(a)(1) and (4)(A). See, *e.g.*, *O'Neil* v. *Picillo*, 883 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990). Alabama state law also holds operators, generators and transporters of hazardous materials liable for cleanup of hazardous substance sites. Ala. Code §§ 22-30A-2, 22-30A-8 (1990).

In short, Alabama has several alternatives that would serve its legitimate objectives at least as well as the Additional Fee. Just as in *Hughes* v. *Oklahoma*, 441 U.S. at 338, this statute "is certainly not a 'last ditch' attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legislative local purpose[s] more effectively."

III. THE ADDITIONAL FEE CANNOT BE JUSTIFIED AS A QUARANTINE LAW

This Court's cases upholding state laws that ban the import of some articles of commerce on a "quarantine" theory have no applicability here. As this Court explained in *Philadelphia* v. *New Jersey*, quarantine laws have withstood Commerce Clause challenges because they "prevent[] traffic in noxious articles, whatever their origin"—articles which by "their very movement risk[] contagion and other evils." 437 U.S. at 628-629. Accord *Bowman* v. *Chicago & N.W. Ry.*, 125 U.S. 465, 489 (1888). Alabama's Additional Fee is not a quarantine provision

because it is a tax, not a ban,[29] and because it is not evenhanded.

Although quarantine statutes may appear to discriminate facially against interstate commerce because they are directed at out-of-state commerce, they are in fact evenhanded because all traffic in those items is prevented. *Philadelphia* v. *New Jersey*, 437 U.S. at 628-629. See, *e.g.*, *Clason* v. *Indiana*, 306 U.S. 439, 443 (1939) (rejecting Commerce Clause challenge to statute restricting transport of dead animals, noting that State has a similar scheme respecting in-state carcasses).[30] It is entirely appropriate for a court, in weighing the constitutionality of such evenhanded statutes, to employ a balancing test to determine whether the incidental effects on interstate commerce are outweighed by the dangers inherent in the movement of these commodities.[31] *Philadelphia* v. *New Jersey*, 437 U.S. at 622; *Asbell* v. *Kansas*, 209 U.S. 251, 256 (1908).[32]

---

[29] A tax cannot be justified as a quarantine since quarantined items must be destoyed immediately to protect the public health. *Philadelphia* v. *New Jersey*, 437 U.S. at 628-629.

[30] Although some of the quarantine cases do not explicitly search for an in-state equivalent to the discriminatory statutes, such a search is unnecessary where it is apparent that "[t]he hostility is to the thing itself, not to merely interstate shipments of the thing." *Illinois* v. *General Electric*, 683 F.2d at 214.

[31] Although the quarantine cases predate *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), their balancing test is not unlike the approach established in that case to determine the constitutionality of a regulatory statute that is evenhanded in its application, but which incidentally burdens interstate commerce.

[32] To the extent that earlier cases suggest that the items involved are not articles of commerce, they have been implicitly overruled by the last fifty years of Commerce Clause jurisprudence, which has recognized the broad range of intrastate activities that can affect interstate commerce. See, *e.g.*, *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (returning to Chief Justice Marshall's broad definition of commerce in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824)); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *United States* v. *Darby*, 312 U.S. 100 (1941). The comprehensive federal regulation of hazardous waste management services is consistent with this broad view. See discussion pp. 2-7, *supra*.

This Court has repeatedly emphasized that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some extension of federal control or regulation" (*Hughes* v. *Oklahoma*, 441 U.S. at 326 n.2). Accord *Sporhase* v. *Nebraska*, 458 U.S. 941, 951-952 (1982); *Philadelphia* v. *New Jersey*, 437 U.S. at 622-623. Thus, a conclusion in this case that hazardous waste is not an article of commerce would cast doubt on the constitutional basis for all hazardous waste regulation under RCRA.

Alabama's Additional Fee is not a quarantine statute because Alabama does not preclude the disposal of hazardous waste that is generated within its borders. As the Court explained in *Guy* v. *Baltimore*, 100 U.S. 434, 443 (1879):

> In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no

> difficulty in holding such legislation to be in conflict with the Constitution of the United States.

See *National Solid Wastes Mgmt. Ass'n* v. *Alabama Dep't of Envt'l Mgmt.*, 910 F.2d 713, 719 (11th Cir. 1990) (ban on transport of hazardous waste into Alabama from some, but not all, States suggests that hazardous waste "is not inherently too dangerous to be a product in commerce"); *Illinois* v. *General Electric Corp.*, 683 F.2d at 215-216 (in striking down state ban on the import of nuclear waste, noting that State allowed in-state nuclear waste to be shipped and stored within the State).

Although Alabama claims that it is motivated by health and safety concerns, its higher fee is directed at wastes that come from out of State, not at those which are intrinsically more dangerous for some reason. A quarantine rationale provides no justification for differential treatment of wastes based solely on their State of origin, absent any difference in degree of dangerousness related to their out-of-state origin.[33]

Alabama's reliance upon this Court's decision in *Maine* v. *Taylor*, 477 U.S. 131 (1986), to justify the

---

[33] In *Philadelphia* v. *New Jersey*, the Court noted that in the quarantine situation, movement of the quarantined item was considered unsafe, and distinguished the New Jersey statute, which was concerned with evils after disposal, not during transportation. 437 U.S. at 629. In the instant case, the Alabama Supreme Court relied on transportation risks as a justification for Alabama's Additional Fee statute, Pet. App. 44a, but if transportation risks were its true concern, Alabama would place a tax on all transportation of hazardous waste, not just movement from out of State to in-state disposal sites (which may involve shorter transportation distances *within* Alabama than occur in many in-state shipments).

differential treatment of out-of-state generated hazardous waste is unwarranted. *Maine* v. *Taylor* is not, in fact, a quarantine case. Rather than upholding a state law that banned import of an item that would be similarly treated within Maine, *i.e.*, a law against the import of diseased baitfish, it upheld a state law that banned the import of all baitfish because out-of-state baitfish are, in fact, different from in-state baitfish. *Id.* at 148, 151-152. Thus, *Maine* v. *Taylor*, *supra*, follows the logic of the rule set forth in *Philadelphia* v. *New Jersey*, 437 U.S. at 629, that out-of-state articles of commerce must be treated the same as in-state articles of commerce when they are indistinguishable. The converse of that rule, as demonstrated in *Maine* v. *Taylor*, *supra*, is that the comparable treatment rule does not apply when the articles are *dissimilar*. Since the facts in *Maine* v. *Taylor* demonstrated that the out-of-state baitfish were different, and that the difference posed a substantial threat to the State's natural resources, they could be banned absent a less discriminatory means of protecting Maine's environment. 477 U.S. at 140. In contrast, here the trial court found that out-of-state generated hazardous waste is the same as Alabama-generated hazardous waste (Pet. App. 86a), and no one has disputed that finding. Alabama's discriminatory provision is accordingly unconstitutional.

Respondents cite *Maine* v. *Taylor* for the proposition that state measures that seek to protect public health, safety, or the environment are constitutional, in contrast with those that attempt to place in-state interests in a position of commercial advantage. Hunt Br. in Opp. 11; Sizemore Br. in Opp. 9-10. The Court made no such distinction in that case. While it did recognize that state laws that amount to simple

economic protectionism have been subject to a virtual per se rule of invalidity, 477 U.S. at 148, it also reconfirmed the unconstitutionality of "laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade," noting that "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 148 n.19, quoting *Philadelphia* v. *New Jersey*, 437 U.S. at 626. See also *Wyoming* v. *Oklahoma*, 112 S. Ct. at 801. In upholding the ban on baitfish imports at issue in *Maine* v. *Taylor*, the Court relied in part on the lower court findings that the State's justifications for the statute were legitimate, 477 U.S. at 148-149, but that did not end the inquiry. Despite the proper motivations of the legislators, the Court subjected the Maine statute to the strict scrutiny test, and found it constitutional only after determining that Maine's "legitimate local purposes * * * could not adequately be served by available nondiscriminatory alternatives." *Id.* at 151.

Thus, *Maine* v. *Taylor* is fully consistent with the holding and rationale of *Philadelphia* v. *New Jersey*. Both cases confirm the unconstitutionality of Alabama's Additional Fee, which serves no legitimate state purpose that could not adequately be served by available nondiscriminatory alternatives.

CONCLUSION

For these reasons, the judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

GERALD H. YAMADA
Principal Deputy General Counsel

HARRIET S. SHAPIRO
Assistant to the Solicitor General

LISA K. FRIEDMAN
Associate General Counsel for Solid Waste and Emergency Response

PETER R. STEENLAND, JR.
ANNE S. ALMY
NANCY K. STONER
LOUISE F. MILKMAN
Attorneys

ANGELIA SOUDER BLACKWELL
Attorney
Environmental Protection Agency

MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45357